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IN THE

Supreme Court of the United States

October Term 1970

No. 1715

JOSEPH BIEHUNIK, DONALD WHALEN, JOSEPH DENECKE, *et al.*,

Petitioners,

vs.

FRANK N. FELICETTA, Commissioner of Buffalo Police Department, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* Additional petitioners, being additional police officers adversely affected by judgment of Court of Appeals, are: ROBERT GRABOWSKI, JACOB ULEWSKI, THOMAS MASTERSON, JAMES DEE, WILLIAM SOCHA, PETER WALTER, NORMAN SIWIEC, JAMES TELESCO, KENNETH BRATOS, FRANCIS CRAVEN, HENRY ULINSKI, JOHN PAWLOWSKI, CHESTER GLICA, CHARLES GIELIEN, MARK KANE, ANTHONY DEJAMES, STANLEY RADWAN, THOMAS GEORGE, DENNIS ZAMIERSKI, MICHAEL LAGODA, WAYNE SHELTERS, RONNIE COOK, SALVATORE PELONERO, JAMES DIEGELMAN, ROBERT BAISH, JOSEPH CACCIATORE, ARTHUR CHROSNIAK, GERALD RAMSEY, PAUL MORGAN, STEPHEN QUALEY, BERNARD McGONAGLE, JOSEPH NEMETH, JOHN ROONEY, VINCENT PANTANO, JOHN HARMON, JAMES GEHEN, MILTON VOGEL, CARL GONDA, STEPHEN GRECO, JOSEPH RANSFORD, LAWRENCE MANNO, STANLEY BIELEC, THOMAS KELLY, RUSSELL BAKER, CARL MOGAVERO, RONALD COYLE, PAUL TAKAC, CHESTER SHEAR, FRANCIS QUINN, GEORGE ADYMY, MICHAEL O'KEEFE, RAYMOND CULLINAN, THOMAS JUSKIEWICZ, AUGUSTINE ZAGORIA, RUSSELL RIZZO, ROBERT WHALEN, JOHN McGEE, JOHN DILIBERTO and ROBERT MAKEY.

** Additional respondents are: THOMAS R. BLAIR, Deputy Commissioner of Buffalo Police Department; HOWARD R. WHEELER, Inspector, Buffalo Police Department; CHARLES DEVOE and KARL MUEHLBAUER, both Captains of the Buffalo Police Department.

The petitioners, Joseph Biehunik, Donald Whalen, Joseph Denecke, *et al.*, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on March 5, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto. The opinion of the United States District Court for the Western District of New York also appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 5, 1971. A motion to recall mandate and to stay its re-issuance pending application to the Supreme Court of the United States for a writ of certiorari was denied on March 24, 1971. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

Whether a Superior Officer, having no probable cause for believing that 62 subordinate officers had committed a crime, and having no probable cause to take said officers into custody, could order said officers to stand in a line-up to be viewed by alleged complainants, under pain of discharge, particularly where said officers were notified that "there is the possibility of resulting criminal prosecution"?

Whether police officers, absent facts warranting formal arrest on any charge, as well as absent facts warranting the filing of disciplinary charges, can be required to comply with the command of their Superior to stand in a line-up in Police Headquarters to be viewed by alleged complainants?

Constitutional Amendments and Statutory Provisions Involved

Fourth Amendment to the United States Constitution, Article IV.

Fourteenth Amendment to the Constitution of the United States.

United States Code, Title 28, § 1343(3):

> "§ 1343. Civil rights and elective franchise.
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

United States Code, Title 42, § 1983:

> "§ 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement of the Case

On April 6, 1970, police officers were subjected to sniper gun fire which originated from premises at 476 Sycamore Street, Buffalo, New York. Other officers responded to a radio alert. The officers entered the building in search of the perpetrator of such gun fire. Hours later one Turner Lane, Jr., a representative of BUILD, Inc., an organization concerned with alleged police misconduct, made complaint to an Inspector of Police that certain persons in said premises were punched and beaten by some policemen and that an unidentified spray had been used. It was claimed that some of such persons were hospitalized. Thereafter Inspector Wheeler took sworn statements from a number of the persons who were in the above designated premises, 476 Sycamore Street being in the Fourth precinct of the City of Buffalo Police Department. The Commissioner acquiesced in the request of BUILD, Inc. to assemble photographs of all police officers, including detectives, connected with precincts 1, 3, 4 and 8 of the City of Buffalo, as well as members of the K-9 Corps and the Tactical Patrol Unit, and to submit the photographs to the persons making complaint as to the incident of April 6, 1970 at 476 Sycamore Street, Buffalo, New York; that said photographs were exhibited although police records did not reveal that the policemen whose likenesses appeared thereon were at 476 Sycamore Street on April 6, 1970. Sixty-two (62) photographs were exhibited, with the result that not only was the alleged identity untrustworthy but a positive identification was made of a police officer, Thomas E. Fay, who was not on duty on April 6, 1970 and was not among the policemen sent to 476 Sycamore Street on that day (R. 6, 7, 17). This information was relayed to Turner Lane, Jr., of BUILD, Inc.

Realizing the erroneous identification, BUILD (Build, Unity, Independence, Libery, Dignity) then requested Commissioner Felicetta to order a formal line-up of the 62 policemen whose photographs has been examined. The Commissioner, on May 27, 1970, issued several orders commanding the 62 policemen to report to the Police Academy on June 3, 1970 (R. 4-16; 18-26). The final paragraph in said orders stated:

> "These arrangements are made for the purpose of staging a lineup so that identification can possibly be made in connection with an incident which occurred at 476 Sycamore Street on April 6, 1970. Because there is the possibility of resulting criminal prosecutions, you will notify each officer so ordered that he has the right to be represented by counsel and/or P. B. A. representative at this lineup. In addition, you will notify each officer that he is entitled to exercise all rights pursuant to the Miranda decision as set forth by the U. S. Supreme Court."

The petitioners instituted a civil action for a summary judgment and a permanent injunction against respondents, pursuant to 28 U. S. C. § 1343 and 42 U. S. C. § 1983. A temporary restraining order was granted and a permanent injunction was issued on August 20, 1970. District Judge Henderson granted such injunction, stating that the orders of Commissioner Felicetta constituted a seizure of the persons of the petitioners and, lacking probable cause to warrant an arrest or a reasonable basis that they had committed any crime, were in violation of the petitioners' Constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. The District Court considered all the circumstances surrounding the factual situation including the injury resulting from enjoining the line-up as balanced against the opportunities the alleged victims had to view the petitioners under other conditions (R. 73).

The Court of Appeals, although conceding that the Commissioner of Police had no reasonable basis for believing that all 62 policemen had committed a crime or that probable cause existed to take them into custody and that the compelled appearance at such line-up was a seizure within the purview of the Fourth Amendment, nevertheless reversed the lower Court on the basis that the order was reasonable.

Reasons for Granting Writ

(1) The line-up of 62 policemen, as dictated by the order of the Commissioner of Police, poses substantial as well as novel questions in relation to the application of the Fourth Amendment to the Constitution of the United States. The threatened seizure of said policemen and forcing them into a line-up presents issues which have never been directly presented to this Court.

There is no statutory provision that authorizes the Commissioner of Police to command the line-up set forth in the notice to appear at the Police Academy for identification purposes. Nor is there any specific rule in the Rules of the Buffalo Police Department warranting such procedure. We are thus confronted with the query as to the threatened seizure of such policemen in violation of the Constitution Fourth and Fourteenth Amendment rights of the petitioners.

The Court of Appeals, Second Circuit, in this case concluded that (a) the compulsory presence of the petitioners at the Police Academy constituted a seizure; (b) the Police Commissioner had no reasonable basis to believe that the 62 policemen had committed a crime, and (c) no probable cause existed to take any of said policemen into custody (Appendix A). In addition to the foregoing, the

order of the Police Commissioner contained the threat "Because there is the possibility of resulting criminal prosecution" (R. 15, 19, 21, 25).

Recognizing the doctrine that "policemen, like teachers and lawyers, are not relegated to the watered-down version of Constitutional rights." [Garrity v. State of New Jersey, 385 U. S. 493], it becomes apparent that initially the petitioners are each entitled to the "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." [Union Pac. R. Co. v. Botsford, 141 U. S. 250]. Thus, the policeman is entitled to be free from any unreasonable seizure of his person and is entitled to be free from all governmental intrusion [Terry v. Ohio, 392 U. S. 1] unless arrest is made upon probable cause and the police officer is in lawful custody. [U. S. v. Wade, 388 U. S. 218 (opinion of Justice Fortas concurring in part and dissenting in part).] Therein Justice Fortas, speaking of the right to authorize a line-up, said at page 260:

> "It is an incident of the State's power to arrest, and a reasonable and justifiable aspect of the State's custody resulting from arrest."

Not a single petitioner has been arrested, nor are they in lawful custody. Further, the Commissioner conceded that he had no reasonable basis to believe that any of the petitioners had committed a crime.

Petitioners are conversant with the responsibility of the Commissioner of Police to govern and discipline the members of the police department, and that he possesses authority to investigate their competency and ability to serve as such police officers. However, the command of the Police Commissioner, dated May 27, 1970, informed the police officers as to the sole purpose of the line-up,

namely, "These arrangements are for the purpose of staging a line-up so that identification can possibly be made * * *" (R. 15, 19, 21 and 23). The identification referred to related to those persons who had examined the photographs of 62 petitioners. The results of the identification process were clearly spelled out in such order: "* * * the possibility of resulting criminal proceedings" (Exhibits A, C; R. 15, 19, 21 and 23). Their appearance in said line-up was not for the purpose of interrogating them as to their presence at 476 Sycamore Street, Buffalo, New York on April 6, 1970, nor securing an accounting of their own conduct at the aforesaid place and date. Paraphrasing the expression of Justice Fortas in *Gardner v. Broderick, Police Commissioner,* 392 U. S. 273, at page 279, "it is clear that petitioners' presence in the line-up was demanded before the Commissioner in part so that it might be used to prosecute them."

The above factor was clearly overlooked or misunderstood by the Court of Appeals, Second Circuit, in its opinion (Appendix B).

(2) The decision below raises a significant problem: whether the seizure of a person without reasonable grounds to believe such person has committed a crime may be sanctioned without securing a warrant based on probable cause.

It is undisputed that the order of the Commissioner herein directed a seizure of the 62 petitioners. It is also undisputed that the Fourth Amendment governs seizures of the person. *Terry v. State of Ohio,* 392 U. S. 1, wherein it was said at page 16:

> "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate a trip to the stationhouse and prosecution for crime —'arrests' in traditional terminology."

However, the same Court indicated that not every detention was an arrest, and distinguished that an intrusion pursuant to an arrest was entirely different from a limited search for weapons. In our present situation there were no underlying facts involving the necessity of immediate action in search of weapons.

It has been further established that inspections by authorities of a person's home or commercial building involve a limited invasion of a citizen's privacy; also that a health official need not come forward with the same kind of proof to a magistrate to secure a warrant as he would be compelled to present if he were seeking a warrant to search to discover the fruits of a crime. [Camara v. Municipal Court of the City and County of San Francisco, 387 U. S. 523; See v. City of Seattle, 387 U. S. 541.]

In both cases the Court held that inspection, as involved therein, by administrative agents could only be compelled within suitable warrant procedure. This despite the Court's observation that if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

In our present case, conceding the interest of the public in law enforcement, there was no attempt made by the Commissioner to apply to an impartial magistrate for an order authorizing the seizure contemplated. Application for such a line-up seizure would compel an application to the Court on the same reasoning as was applied in the search by building inspectors.

An unreasonable seizure of a person was observed in *Davis v. State of Mississippi*, 394 U. S. 721, wherein police, without warrant, took 24 Negro youths to police headquarters where they were fingerprinted, questioned and re-

leased without charge. The State conceded that such custody was without warrant and lacking probable cause. Fingerprints of petitioner were found to match fingerprints taken from the window of complainant's home. In reversing, the Court, condemning investigatory seizures of persons and as to the breadth of the Fourth Amendment, said:

> "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed 'arrests' or 'investigatory detentions'" (726-7).

Although the Court stated that detention under narrowly defined circumstances might be found to comply with the Fourth Amendment, in spite of the lack of probable cause, nevertheless it condemned the police action because of the failure to secure a warrant by a judicial officer. The Commissioner, in our present case, should have at least submitted the facts within his possession to an impartial judicial officer.

Recently the District of Columbia Court of Appeals considered two cases wherein the query was whether, absent facts warranting formal arrest for rape, a person identified from photographs as the possible perpetrator may be required by court order and under other Constitutional safeguards to stand in a line-up to be viewed by the victim. [Clarence Wise, Jr. v. The Hon. Tim Murphy and The Hon. Alfred Burka; John Doe v. The Hon. Tim Murphy (not reported; March 16, 1971).]

After deciding that under the District of Columbia Code 1967 §§ 11-981 and 28 U. S. C. 1651 the Judge of the General Sessions Court had authority to issue an order directing a line-up of the suspect, the Court proceeded to render a decision that a line-up order prior to arrest could be

squared with the Fourth Amendment under appropriate circumstances. It will be observed that the Court determined that the order directing the line-up was proper under D. C. Code 1967 and the "All Writs" power under Section 1651(a) *(supra)*. Our present case is readily distinguishable inasmuch as New York State has no specific statute authorizing a "seizure" or "line-up" without arrest, and the Commissioner of Police herein made no application for an order for such line-up to the Courts.

Following a hearing *en banc* the majority of the Court, in justifying such a line-up, said at page 18 of the unofficial report:

> "On balance, and realistically viewing the impact of a court-ordered lineup of the kind here contemplated on liberty, we conclude, under the test expressed in Camara v. Municipal Court, 387 U. S. 523 (1967), that the public interest can validly require this intrusion.
>
> Under proper circumstances, and against a backdrop of required specificity, such a device as court-ordered lineups can prove to be reasonably related to governmental and private rights, and thus a constitutional balance regarding both."

Despite their decision, the Court reversed the ordered line-up in the John Doe case without prejudice to the Government submitting more specific information. The Government herein proceeded pursuant to statutory authority. The Court, after examining the affidavits, determined that the facts presented to the Court "would invite intrusions upon Constitutionally guaranteed rights based on nothing more substantial than [possible] inarticulate hunches * * *." Commissioner Felicetta did not seek the aid or assistance of a neutral and detached judicial officer. Instead, he exercised his own judgment in executing his order of May 27, 1970, no doubt prompted by his belief that he had such authority. This is contrary to our teach-

ings in *Beck v. Ohio,* 379 U. S. 89, wherein, at page 97, it was stated:

> "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects' only in the discretion of the police."

The decision of the Court of Appeals, Second Circuit, is believed to be erroneous in view of the situation herein where there was no application made by the Police Commissioner to an impartial Court to evaluate by balancing the need to [seize] against the invasion which the [seizure] entails. [Terry v. Ohio *(supra);* Camara v. Municipal Court *(supra).*] The arbitrariness of the order of the Commissioner of Police resulted in a contemplated interference with the liberty of the petitioners which was without sanction of law and was violative of petitioners' Constitutional rights under the Fourth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Counsel for Petitioners.

May , 1971.

APPENDIX A

Opinion and Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 490—September Term, 1970.
(Argued March 5, 1971.)
(Decided March 5, 1971.)

Docket No. 35543.

JOSEPH BIEHUNIK, DONALD WHALEN, JOSEPH DENECKE, ROBERT GRABOWSKI, JACOB ULEWSKI, THOMAS MASTERSON, JAMES DEE, WILLIAM SOCHA, PETER WALTER, NORMAN SIWIEC, JAMES TELESCO, KENNETH BRATOS, FRANCIS CRAVEN, HENRY ULINSKI, JOHN PAWLOWSKI, CHESTER GLICA, CHARLES GIELIEN, MARK KANE, ANTHONY DEJAMES, STANLEY RADWAN, THOMAS GEORGE, DENNIS ZAMIERSKI, MICHAEL LAGODA, WAYNE SHELTERS, RONNIE COOK, SALVATORE PELONERO, JAMES DIEGELMAN, ROBERT BAISH, JOSEPH CACCIATORE, ARTHUR CHROSNIAK, GERALD RAMSEY, PAUL MORGAN, STEPHEN QUALEY, BERNARD McGONAGLE, JOSEPH NEMETH, JOHN ROONEY, VINCENT PANTANO, JOHN HARMON, JAMES GEHEN, MILTON VOGEL, CARL GONDA, STEPHEN GRECO, JOSEPH RANSFORD, LAWRENCE MANNO, STANLEY BIELEC, THOMAS KELLY, RUSSELL BAKER, CARL MOGAVERO, RONALD COYLE, PAUL TAKAC, CHESTER SHEAR, FRANCIS QUINN, GEORGE ADYMY, MICHAEL O'KEEFE, RAYMOND CULLINAN, THOMAS JUSKIEWICZ, AUGUSTINE ZAGORIA, RUSSELL RIZZO, ROBERT WHALEN, JOHN McGEE, JOHN DiLIBERTO and ROBERT MAKEY,

Plaintiffs-Appellees,

v.

FRANK N. FELICETTA, Commissioner of Buffalo Police Department; THOMAS R. BLAIR, Deputy Commissioner of Buffalo Police Department; HOWARD R. WHEELER, Inspector, Buffalo Police Department; CHARLES DeVOE and KARL MUEHLBAUER, both Captains of the Buffalo Police Department,

Defendants-Appellants.

Before: Lumbard, *Chief Judge,*
Kaufman and Anderson, *Circuit Judges.*

Appeal from a decision and order of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, enjoining the Commissioner of Police of Buffalo, New York, from staging a lineup of Buffalo policemen.

Reversed.

Anthony Gregory, Assistant Corporation Counsel (Anthony Manguso, Corporation Counsel, Buffalo, N. Y., on the brief), for Appellants.

William B. Mahoney, Buffalo, N. Y., for Appellees.

KAUFMAN, Circuit Judge:

This appeal presents another aspect of the continuing problem of reconciling the state's powers as employer with the constitutional protections its employees enjoy as citizens. The Buffalo Police Commissioner, Frank Felicetta, commanded 62 city policemen, upon pain of discharge, to appear in a lineup for possible identification by civilians who allegedly had been assaulted by certain patrolmen. The District Court permanently enjoined the lineup. For the reasons set forth below, we reversed the judgment in open court following oral argument and ordered that the mandate issue forthwith.

I.

At approximately 8:30 in the evening of April 6, 1970, patrolling policemen close to 476 Sycamore Street came under gun fire, allegedly from a sniper positioned in the building. Reinforcements were quickly called in by radio to assist in suppressing the fire. Soon thereafter, between 10 and 25 officers entered the building to apprehend the suspected gunman. Complaints shortly received by the Commissioner charged that several members of this squad

burst unannounced into occupied apartments of the building and without justification beat the inhabitants severely, requiring hospitalizations in several instances.

Commissioner Felicetta pursued his investigation of the complaints by assembling the names, 62 in number, of policemen who were on duty in the vicinity of 476 Sycamore Street on the night in question. Several days later, a few complainants were permitted to view photographs of the 62 officers. Apparently because of the age of the photographs,[1] the resulting identifications proved untrustworthy. After further consultation with the complainants and discussion with Buffalo's Corporation Counsel, the Commissioner on May 27 issued a series of orders to his subordinate officers directing the 62 policemen to report to the Police Academy in their usual duty dress at 6:00 p. m. on June 3, 1970. The order concluded:

> These arrangements are made for the purpose of staging a lineup so that identification can possibly be made in connection with an incident which occurred at 476 Sycamore Street on April 6, 1970. Because there is the possibility of resulting criminal prosecutions, you will notify each officer so ordered that he has the right to be represented by counsel and/or P. B. A. representative at this lineup. In addition, you will notify each officer that he is entitled to exercise all rights pursuant to the Miranda decision as set forth by the U. S. Supreme Court.

The policemen promptly instituted this civil rights action, alleging that the lineup would deprive them of various constitutional rights. 28 U. S. C. §§ 1343, 1983. The Dis-

[1] The photographs shown were removed from police personnel files; most had been taken at the time the officer joined the police force.

trict Court thereupon issued an *ex parte* temporary restraining order shortly before noon on June 3 enjoining the lineup.[2] Commissioner Felicetta apparently agreed not to conduct the lineup during the suit's pendency, and on August 20 a permanent injunctive order was entered.

II.

As we perceive it, the principal ground for Judge Henderson's injunction is that the compulsory presence of the 62 officers at the Police Academy would have constituted a "seizure" of their persons, unsupported by an arrest warrant or probable cause to arrest. It is conceded by the Commissioner that he had no reasonable basis for believing that all 62 officers had committed a crime or that probable cause to take them into custody existed. Nor do we question on this appeal that the compelled appearance at the lineup can be considered a "seizure" of the officers

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[2] In addition to the reasons stated in the text for our summary reversal in open court of this extraordinary injunction, we note that the procedure in granting the *ex parte* temporary restraining order on June 3, 1970 was highly irregular. At argument it was conceded that no notice of the application was given to the Buffalo Police Department. The police headquarters are located close to the federal courthouse, and no reason whatever was given for failing to give such notice. The district courts should scrupulously observe the clear requirement of Rule 65(b) of the Federal Rules of Civil Procedure, that "[a] temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if . . . it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. . . ." As we have stated in prior opinions, it will be very rare indeed when the issuance of such an order without notice will be justified, since normally, within a brief period of time and without much difficulty, the opposing parties and their counsel can be notified of the application by telephone and can appear before the district court. See *Austin v. Altman*, 332 F.2d 273, 275 (2d Cir. 1964); *Arvida Corp. v. Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958) (Lumbard, *J.*, concurring).

within the purview of the Fourth Amendment. A person's ability to pursue lawful activities of his own choosing without official interference can be as abruptly infringed by an authoritative command to present oneself as by a policeman's hand on the shoulder or handcuffs on the wrist. *Cf. Davis v. Mississippi,* 394 U. S. 721 (1969); *Terry v. Ohio,* 392 U. S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.")

Nor do we take issue with plaintiffs' premise that the Constitution protects policemen as fully as other citizens. They, "like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. United States,* 385 U. S. 493, 500 (1967).

The plaintiffs would have us end our inquiry at this point. They would have us say that to "arrest" a policeman, like any other citizen, without probable cause is an unreasonable seizure, and hence outlawed by the Fourth Amendment. In the familiar criminal arrest context, the reasonableness of a seizure of the person is indeed usually measured by the existence *vel non* of probable cause. But we cannot accept the contention that this principle, well established as it may be, must be applied inflexibly even in cases far removed from the criminal arrest arena.

In a series of recent decisions the Supreme Court has confirmed the obligation of the courts in such atypical cases to undertake the familiar task of weighing the governmental interest in the particular intrusion against the offense to personal dignity and integrity. In *Camara v. Municipal Court,* 387 U. S. 523 (1967), and *See v. City of Seattle,* 387 U. S. 541 (1967), the Court considered the reasonableness of area-wide health inspections under the Fourth Amendment. Noting that these vital programs

would be crippled if the customary showing of probable cause were required, and that such inspections normally do not infringe privacy as severely as the characteristic criminal search, the Court approved the issuance of inspection warrants on a far less stringent showing of need. In the following term, *Terry v. Ohio,* 392 U. S. 1 (1968), applied a similar analysis in upholding a limited stop and frisk seizure and search made without probable cause or warrant, where the officer had reason to believe that the suspect was armed and dangerous. Finally, in *Davis v. Mississippi,* 394 U. S. 721 (1969), the Court strongly suggested that probable cause would be no prerequisite to compelling (under some sort of judicial control) a citizen to report to the station house for the narrow purpose of obtaining fingerprints.

III.

Set against this background, the question before us becomes whether upon a balance of public and individual interests, the order to plaintiffs to report to the lineup was reasonable under the particular circumstances, even though unsupported by probable cause.

Decisive to our conclusion that the lineup was indeed "reasonable" is the substantial public interest in ensuring the appearance and actuality of police integrity. We do not believe that the public must tolerate failure by responsible officials to seek out, identify, and appropriately discipline policemen responsible for brutal or unlawful behavior in the line of duty, merely because measures appropriate to those ends would be improper if they were directed solely toward the objective of criminal prosecution. A trustworthy police force is a precondition of minimal social stability in our imperfect society, a fact

repeatedly dramatized by tragic incidents of violent conflict between police and some groups of civilians that continue to break out periodically in so many of our cities. Moreover, it is a correlative of the public's right to minimize the chance of police misconduct that policemen, who voluntarily accept the unique status of watchman of the social order, may not reasonably expect the same freedom from governmental restraints which are designed to ensure his fitness for office as from similar governmental actions not so designed. The policeman's employment relationship by its nature implies that in certain aspects of his affairs, he does not have the full privacy and liberty from police officials that he would otherwise enjoy. So long as the actions of a policeman's superior remain within reasonable bounds, there can hardly be that affront to expectations of personal autonomy which marks the state's coercive power in the typical arrest case.

Thus that plaintiffs are not only citizens protected by the Constitution but also policemen is relevant in two respects. Their status both heightens the public interest served by the planned lineup and lessens the adverse impact of the investigation on the plaintiffs' legitimate interest in personal autonomy.

We should not, of course, be understood as suggesting that policemen will be required to tolerate invasions of their freedoms which are not reasonably related to the special considerations arising from their relationship of employment. Policemen do not abandon their constitutional rights upon induction into the department. The facts before us on this appeal, however, do not require that we precisely delineate the outer bounds of reasonableness in investigations of suspected police misconduct, for this is not a doubtful case.

The lineup was ordered by that official of the police department charged with running an efficient and law-abiding organization—the Police Commissioner—and was clearly and highly relevant to the legitimate end of assuring his employees' trustworthy performance of their assigned tasks.[3] Commissioner Felicetta's reference in his order directing the lineup to a possible criminal prosecution did not dilute the potential usefulness of the lineup in administering disciplinary measures.[4] We therefore need not consider at this time the propriety of enjoining a similar lineup conducted exclusively with criminal prosection in mind.[5] Finally, the lineup was to be conducted at a

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[3] Compare *United States v. Blok*, 188 F.2d 1019 (D. C. Cir. 1951) (search of government employee's desk for evidence of unrelated petty larceny held not reasonable), with *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966) (search of customs employee's jacket for evidence of on-the-job theft of customs goods held reasonable). *Cf. Gardner v. Broderick*, 392 U.S. 273, 278 (1968) (dismissal of public employee for refusal to answer "questions specifically, directly, and narrowly relating to the performance of his official duties" not barred by fifth amendment); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968) (same).

[4] Equally unconvincing is the mere fact that no formal disciplinary proceedings had begun prior to the scheduled lineup; it may well have been entirely proper to defer such proceedings until identifications had been made.

[5] See *United States v. Hagarty*, 388 F.2d 713, 717 (7th Cir. 1968) (eavesdropping of public employee's office not "made in an effort to supervise and investigate . . . but was designed to detect criminal activity. . . ."). And compare *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725 (M.D. Ala. 1968) (fruits of joint warrantless search of college dormitory room by dean and police admissible in expulsion proceeding), with *Piazzola v. Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970) (fruits of identical search inadmissible in criminal proceeding).

time and place that were well within the usual demands of a policeman's job.[6]

Under these circumstances, to forbid defendants to proceed with the lineup would unduly hamper police officials in their difficult task of supervising and maintaining a dependable and trusted police force, with little compensating gain to plaintiffs' individual rights.[7]

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[6] Compare *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (search of government employee's desk unreasonable where desk permitted to be used for private storage) with *United States v. Donato*, 269 F. Supp. 921 (E.D. Pa.), aff'd mem., 379 F.2d 288 (3d Cir. 1967) (search of mint employee's locker reasonable where lockers were regularly inspected for sanitary reasons, and regulation expressly negated private use).

[7] The District Court also found relevant to its determination of reasonableness the likelihood that the 62 policemen would be presented without additional men known to be innocent, or, in the event that sufficient decoys were added, that the proceedings would "resemble a circus." We have not been cited to any constitutional requirement that any proportion of a lineup consist of men known to be innocent. A lineup consisting only of the 62 policemen would not be "so impermissibly suggestive and conducive to irreparable mistaken identification [as to deny] due process of law," *Stovall v. Denno*, 388 U.S. 293 (1967), because of the 62 no more than 10 were accused of illegal assault. And it was in any case a clear abuse of the federal District Court's discretion, when asked to enjoin local police investigations, to assume that they would be conducted in an unconstitutional manner in the absence of specific proof.

We note also that the policemen were explicitly notified of their right to have counsel present. See *United States v. Wade*, 388 U.S. 218 (1967). And no waiver of legal objections to any aspect of the proceedings was demanded. See *Gardner v. Broderick*, 392 U. S. 273 (1968) (waiver of fifth amendment rights); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (same).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of March, one thousand nine hundred and seventy-one.

Present: Hon. J. Edward Lumbard, *Chief Judge*,
Hon. Irving R. Kaufman,
Hon. Robert P. Anderson, *Circuit Judges*

JOSEPH BIEHUNIK, *et al.*,
Plaintiffs-Appellees,

v.

FRANK N. FELICETTA, Commissioner of Buffalo Police Department; THOMAS R. BLAIR, Deputy Commissioner of Buffalo Police Department; HOWARD R. WHEELER, Inspector, Buffalo Police Department; CHARLES DEVOE and KARL MUEHLBAUER, both Captains of the Buffalo Police Department,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the injunctive order be and it hereby is vacated with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH BIEHUNIK, *et al.*,

Plaintiffs,

vs.

FRANK N. FELICETTA, Commissioner of Buffalo Police Department, *et al.*,

Defendants.

Civil 1970-252.

William B. Mahoney, Esq., Buffalo, New York, Attorney for Plaintiffs.

Anthony Gregory, Esq., Assistant Corporation Counsel, City of Buffalo, for the Defendants.

Paul J. Brinson, Esq., Kenmore, New York, appearing on behalf of certain individuals as *amicus curiae*.

Edward I. Koren, Esq., New York Civil Liberties Union, Niagara Frontier Chapter, appearing on behalf of Build, Inc. as *amicus curiae*.

The plaintiffs are Buffalo policemen, 62 in number, who have commenced an action alleging jurisdiction pursuant to Title 28 U. S. C. § 1343 and Title 42 U. S. C. § 1983 against Frank N. Felicetta, Commissioner of Police of the City of Buffalo, Thomas R. Blair, Deputy Commissioner of Police, Edward R. Wheeler, Inspector in the Buffalo Police

Department, and Charles DeVoe and Karl Muehlbauer, both Captains in the Buffalo Police Department, seeking a declaratory judgment and injunctive relief for a threatened violation of their constitutional rights.

It is claimed that on April 6, 1970, at approximately 8:30 p. m., an incident took place at 476 Sycamore Street which is located in a predominantly Negro area in the City of Buffalo. Although the exact details of this incident remain cloudy and undoubtedly will be the subject of further judicial scrutiny, it is alleged by plaintiffs that on the above date a sniper in this neighborhood was firing at policemen and thereafter a call was made over the police radio summoning additional police to aid in uppressing that fire. Subsequently, some police (variously estimated at between ten and twenty-five in number) entered a building located at 476 Sycamore Street, without a warrant, apparently in the belief that the sniper was housed therein. It is alleged by certain persons that individuals inside that address were punched and beaten by policemen and that a deterrant spray was used. As a result, it appears that these persons were taken to a hospital located nearby and treated for injuries received as a result of the police action.

Thereafter, complaints were made to the defendant Felicetta as Commissioner that the police on that evening, without proper provocation or cause, committed assaults upon certain individuals, entered a building without a warrant or probable cause and in general abused the power of their office and inflicted injuries without reason on persons residing there. Upon receiving these complaints, the defendant, Inspector Wheeler, began an investigation, interviewed certain of the complaining parties, took sworn statements from such parties, and determined that the 62 plaintiffs were on duty or were nearby the address on that

evening and were policemen who in all likelihood responded to the call for help. On April 13, 1970, defendant Inspector Wheeler displayed photographs of the plaintiffs to those making the complaints and as a result approximately five or six of the plaintiffs were identified as being involved in the incident. Subsequently those five or six policemen were questioned by defendant Wheeler and sworn statements were taken from them. It also appears that one of the policemen identified by the occupants of 476 Sycamore Street *et al.* was not on duty at the time of the alleged incident. Apparently, the investigation into these complaints was less than satisfactory in the opinion of one Turner Lane, the Chairman of BUILD, INC. (Build Unity, Independence, Liberty, Dignity) and sometime during April 1970 he requested that defendants stage a formal lineup of the 62 plaintiffs before those who claimed they had been injured. On May 27, 1970, defendant Felicetta issued five orders directing certain inspectors in the Buffalo Police Department to notify the plaintiffs to report to the Police Academy in their usual duty uniform at 6:00 p. m. on June 3, 1970, for the purpose of staging a formal lineup of the plaintiffs before third persons who were occupants of 476 Sycamore Street.

It is not disputed that at such formal lineup the plaintiffs would be required to exhibit themselves in uniform or in mufti—if that is their usual duty dress—to the occupants of 476 Sycamore Street. The motions sent to the inspectors by the Police Commissioner, directing such a formal lineup, included the following language:

> These arrangements are made for the purpose of staging a lineup so that identification can possibly be made in connection with an incident which occurred at 476 Sycamore Street on April 6, 1970. *Because there is the possibility of resulting criminal prosecutions*, you will notify each officer so ordered that he

> has the right to be represented by counsel and/or P. B. A. (Police Benevolent Association) at this line-up. In addition, you will notify each officer that he is entitled to exercise all rights pursuant to the *Miranda* decision as set forth by the United States Supreme Court. (Emphasis added.)

During the period of investigation from approximately April 8, 1970 to date, no formal charges have been lodged against any person arising out of the events occurring at and about 476 Sycamore Street. No complaint has ever been filed in the local courts, no warrant has ever been issued, no information has been filed and no indictment has been returned, nor does it appear that any person has formally complained to the local District Attorney or the United States Attorney for this district.

On the *ex parte* application of the plaintiffs on June 3, 1970, this court issued an order to show cause why an order should not be made ordering the directive of May 27, 1970, to be in violation of the rights of the plaintiffs and temporarily enjoining the staging of any lineup until the return date of the show cause order, June 8, 1970. The plaintiff policemen have now moved to make permanent the temporary order of this court restraining the defendant Commissioner and others from conducting such a line-up.

The substance of the complaints outlined above, if true, indicates that some members of the Buffalo Police Department have flagrantly disregarded individuals' rights and are unworthy of the public trust vested in them by virtue of their employment. If so, it should be a prime objective of the Commissioner to single out such persons and remove them from employment with dispatch, since unbridled and unfettered police authority runs counter to the principles upon which our government rests. At the same time, this

court is not blind to the obvious problems of police morale arising from a blanket order of the Commissioner to a large body of his men, requiring them to report en masse for the purpose of being viewed and perhaps accused of crime by third persons. However, the wisdom of such an order cannot in any way be a subject of the court's concern. This court can only determine if the order of the Commissioner violates the civil liberties of the policemen by depriving them of a constitutional right and now turns to that question.

The Commissioner of Police of the City of Buffalo has the duty "to preserve peace and good order in the city" (section 223, Charter of the City of Buffalo) and "with the power and duty of governing and disciplining the department and members of the police force and all subordinates and employees of the department, and to that end may, regulations not inconsistent with this Act, or any general from time to time, make and enforce orders, rules and law . . ." (section 224, Charter of the City of Buffalo). Moreover, section 2.10 of the Rules and Regulations for the Government and Discipline of the Department provides that "superiors shall thoroughly investigate, and take proper action, whenever a complaint is made against a member of the department and shall file through official channels a complete report thereon." No one questions the right of the defendant Commissioner of Police to properly maintain discipline within the police force and to effectively investigate and take proper disciplinary action against policemen when violations of law or departmental regulations are discovered. Indeed, immediately upon receiving complaints concerning the incident at 476 Sycamore Street, the Commissioner, through his subordinates, began an investigation including the taking of statements of certain officers who had been tentatively identified from photo-

graphs as participants in the incident. The right to question his men is a necessary part of the Commissioner's ability to investigate and discipline the members of the force and the Supreme Court has held that "questions specifically, directly, and narrowly relating to the performance of . . . official duties" are perfectly legitimate. *Gardner v. Broderick*, 392 U. S. 273 at 278 (1968), see also *Uniform Sanitation Men v. Sanitation Commissioner*, 392 U. S. 200 (1968).

The question, however, in this case is whether the Commissioner can constitutionally order his policemen to appear in a formal lineup before third persons where "there is the possibility of resulting criminal prosecutions" when no charges have ever been made against any of the policemen individually and there is an absence of probable cause to believe that any individual policeman has committed a crime.

This court believes that neither *United States v. Wade*, 388 U. S. 218 (1967) and related cases concerning lineups, nor the cases of *Schmerber v. California*, 384 U. S. 757 (1966) and *Holt v. United States*, 218 U. S. 245 (1910), answer the problem presented. Such cases arise in a context where the defendant is lawfully in custody or under arrest for probable cause (a circumstance not present here). The fact that a lineup does not violate Fifth Amendment rights or that when a lineup is conducted the accused is entitled to counsel, does not answer the more fundamental question as to the circumstances under which persons may be required to stand in a lineup, nor can the Commissioner of Police in this case be compared to a private employer whose actions in attempting to detect a dishonest employee cannot be considered "state action" under the Constitution.

The defendants at oral argument urged that the Commissioner's lineup order is valid, since it was claimed that policemen have lesser rights than other citizens. This contention was abandoned later in briefs filed with the court. The Constitution does not exclude policemen; the cases dealing with policemen demonstrate that their rights are co-extensive with other citizens, and encumbrances placed on the exercise of their rights will be struck down. *Garrity v. New Jersey,* 385 U. S. 493 (1967); *Gardner v. Broderick, supra.* "(Policemen, like teachers and lawyers, are not relegated to a watered down version of constitutional rights." *Garrity v. New Jersey, supra* at 500.

The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

In *Terry v. Ohio,* 392 U. S. 1 (1968), the court pointed out that the Fourth Amendment "protects people not places" (p. 8). *Katz v. United States,* 389 U. S. 347, 351 (1967). More recently, in *Davis v. Mississippi,* 394 U. S. 721 (1969), the Court held that the detention of 24 Negro youths, during which time their fingerprints were taken, constituted an unreasonable seizure of their persons in violation of the Fourth Amendment where the detentions were based on neither a warrant nor probable cause. The Supreme Court also pointed out:

> To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy

> incident to involuntary detention. *Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."* (Emphasis added.) 394 U. S. 726-7.

To this court it seems that these plaintiffs, as persons, have Fourth Amendment rights which must be respected. The contemplated order, requiring them to be present at a lineup, the purpose of which was clearly to expose them to possible criminal charges, can only be justified if the Commissioner's power to investigate alleged breaches of departmental regulations does not intrude on the policemen's rights under the Fourth Amendment. In Terry v. Ohio, *supra,* the Supreme Court had occasion to consider the scope of the Fourth Amendment and its application to short detentions under an argument that the Fourth Amendment does not prohibit conduct amounting to a "stop and frisk." The Court stated:

> We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. *It must be recognized that when ever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.* (Emphasis added.) 392 U. S. 16.

The requirement that the plaintiffs in this case must report en masse to a certain place at a certain time for purposes of being viewed by third persons unquestionably restrains the policemen's freedom to be elsewhere at that time. To the extent that there is such a restraint, it is a seizure for purposes of the Fourth Amendment and amounts to a wholesale intrusion which is unreasonable and must be enjoined. Such tactics are closely akin to

dragnet practices conducted without probable cause which have been criticized by other courts. *United States v. Anderson,* 406 F. 2d 719 (4th Cir. 1969); *Lankford v. Gelston,* 364 F. 2d 197 (4th Cir. 1966); see also *Schnell v. Chicago,* 407 F. 2d 1084 (7th Cir. 1969).

The Court has reached this conclusion only after a careful review of all the circumstances surrounding this unique factual situation. Among other things the court has considered the nature of the incident, including the lack of formal charges or probable cause for arrest of any of the plaintiffs; the number of men allegedly involved in the incident as compared to the number ordered to report; the likelihood of criminal prosecutions resulting as indicated by the warning in the Commissioner's order, together with the fact that those attempting to make identifications at such a lineup have filed claims in excess of $250,000 against the city. Additionally, the court has considered the injury which will result from enjoining the lineup as balanced against the opportunity the alleged victims have to view the plaintiffs under other conditions.

From all that appears, the proposed lineup falls far short of the fairness required by Supreme Court decisions. *United States v. Wade, supra; Gilbert v. California,* 388 U. S. 263 (1967); see also *Stovall v. Denno,* 388 U. S. 293 (1967). Traditionally and historically it has always been possible in a formal lineup to exculpate the suspect, since the normal procedure is to have the suspect viewed with a group of persons who have no possible connection with the offense. A wrong identification under such circumstances might lead "to the immediate release of an innocent suspect." *Bates v. United States,* 405 F.2d 1104 at 1106 (D. C. Cir. 1968). Here, if the Commissioner in-

tends to show only the 62 plaintiffs, any identification resulting would, although exonerating those not identified, implicate everyone singled out, since there would be no possibility of identifying persons not in the vicinity of 476 Sycamore Street. On the other hand, if the intention is that the 62 policemen will be viewed with an appropriate number of non-suspects (see, *e.g., United States v. Wade,* 388 U. S. 236, f.n. 26, recommending six persons in addition to each accused), there would be 372 individuals (62 times 6) in regular uniform, together with the 62 plaintiffs and a possible 62 attorneys—a grand total of 496 persons. It would appear that the conduct of such a lineup would more resemble a circus than a legitimate effort on the part of the Commissioner to investigate breaches of departmental regulations on the part of the policemen under his supervision. Additionally, there is nothing in the order to indicate that the Commissioner would present those in the lineup separately to each victim to prevent wholesale identifications of policemen by the victims in each other's presence with the attendant dangers of suggestion. *United States v. Wade,* 388 U. S. 218 at 234.

Under such circumstances the order of the Commissioner, requiring persons who are not accused and not in custody to be present before third persons, would violate the Fourth and Fourteenth Amendments to the Constitution, and the identifications, if any, flowing therefrom would be quite possibly suppressed in any subsequent prosecutions. The failure to have such a lineup, however, will not in any way prevent the alleged victims of the incident to view their suspected assailants. Their names are available in the title of this action. Their occupations are known. Indeed, a careful reading of the papers on file in this case will inform the alleged victims of the precinct station where each plaintiff works.

An order enjoining such a formal lineup will not in any way interfere with prosecution for violations of local law. *Cf. Dombrowski v. Pfister*, 380 U. S. 479 (1965); *Douglas v. City of Jeannette*, 319 U. S. 157 (1943). Action by a federal court to protect civil rights will avoid the delay and expense resulting therefrom if this court were to leave the plaintiffs to their remedies under state law. *Baggett v. Bullitt*, 377 U. S. 340 (1964). The plaintiffs should not be forced to choose to comply with the Commissioner's order, for the right of the plaintiffs is not simply that any identification of them, during a period of illegal detention, not be used against them; it is requiring their presence *at all* which is prohibited by the Fourth Amendment, just as it was when Davis and his fellow Negroes were detained without probable cause. The decisions of the Supreme Court of the United States over the last ten years have more than clearly demonstrated that in seeking to discover those who are guilty of crime it will never be permitted, in our society, for law enforcement officials to violate the constitutional rights of those whom it suspects have not obeyed its laws.

The court concludes that the order of the Commissioner of Police, requiring the plaintiffs to stand in a lineup, in the absence of probable cause for their arrest or formal charges against them, deprives the plaintiffs of rights secured under the Fourth and Fourteenth Amendments to the United States Constitution under color of the ordinances of the City of Buffalo, *Terry v. Ohio, supra; Davis v. Mississippi, supra*; *Mapp v. Ohio*, 347 U. S. 643 (1961). As such, it is a deprivation of rights guaranteed under the Civil Rights Act of 1871 (Title 42 U. S. C. § 1983), and this

court has jurisdiction pursuant to Title 28 U. S. C. § 1343 to render equitable relief in the form of an injunction (Title 42 U. S. C. § 1343(4)).

Enforcement of the orders of the Commissioner of Police dated May 27, 1970, in their present form, or any orders in similar form, is permanently enjoined.

So ordered.

/s/ JOHN O. HENDERSON,
United States District Judge

Dated: August 18, 1970.

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IN THE

Supreme Court of the United States

June Term 1971

JOSEPH BIEHUNIK, DONALD WHALEN, JOSEPH DENECKE, *et al.*,

Petitioners,

vs.

FRANK N. FELICETTA, Commissioner of Buffalo Police Department, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

The facts set forth in the petition are essentially correct. Therefore, we state herein only those facts not contained in the petition and which we deem pertinent to the issues presented.

Certain persons on the premises were punched and beaten, an unidentified caustic spray had been used therein affecting the eyes of the occupants (some of whom were infants of extremely tender age), the doors of the apartment had been broken down and the apartment ransacked. This was verified by Police Inspector Howard Wheeler

based on his first hand observations of the apartment and of the victims at the hospital where they had been taken by an ambulance immediately following the incident. In addition, the victims made sworn statements to the foregoing, and a report of the incident was made to the Commissioner of Police by officers of the 12th Precinct. No search warrant was obtained to enter the premises.

A complete investigation of the incident was ordered by the Commissioner. However, the victims were unable to identify any of the officers involved from 104 police photographs, selected at random from neighboring precincts but from an examination of police records and radio logs, the department was able to ascertain that 62 policemen, 6 of whom were detectives, appeared at the scene. Because of the inability of the victims to identify their assailants by name, badge number or photographs, the Commissioner ordered those 62 officers whom the records indicated appeared at the scene, to appear in a lineup.

These officers, almost without exception, were purposely ordered by the Commissioner to appear at a time when they would have otherwise been working on a regularly scheduled tour of duty.

At no time did the Commissioner or any of his command officers threaten or attempt to coerce in any form or manner any of the 62 officers to waive or relinquish any of their Federal Rights prior to their appearance in the lineup.

The following facts will not appear in the record but we state them in the belief that they have a material bearing on this Court's decision.

Subsequent to issuance of the Mandate of the 2nd Circuit, the appellants made a motion to that Court to recall its Mandate. The motion was denied on March 24th, 1971.

Thereafter, the Commissioner reissued his order for the lineup but this time included not only 56 of the original 62, but also 226 additional officers whose sole purpose was to act as "decoys". They were to appear in four groups of approximately 70 officers on four different nights. Immediately thereafter Petitioners applied to this Court for a stay of the Mandate pending application for a Writ of Certiorari. On March 23, 1971, Mr. Justice Harlan denied the application.

These 282 officers appeared at Police Headquarters as directed, in groups of approximately 70, on the four different nights. Before being directed to stand in a lineup, each group was read the following:

> "I hereby advise you that you and each of you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of the State of New York and the Constitution of the United States, including the right to be represented by counsel at this line-up and that should you fail to stand in the line-up as ordered by the Commissioner of Police you may be subject to disciplinary action by the Department of Police that could result in your being reprimanded, fined, suspended from duty or dismissed from the Police Department.
>
> I further advise that any identification, information or evidence which may be gained by reason of your standing in this line-up, as ordered, may not be used against you in a criminal proceeding but may be used only in a disciplinary action by the Department of Police."

Thereupon, all of the 282 officers refused to lineup. Departmental charges of insubordination were placed against all of the officers.

Questions Presented

1. Does the order of the Commissioner of Police directing the 62 subordinate officers who were at the scene of the occurrence to appear in a lineup violate the Fourth Amendment Rights of these officers when the Commissioner has reasonable cause to believe that some of these officers committed gross acts of misconduct resulting in known injuries to innocent victims?

2. May police officers who have not been prevented from asserting their Federal Rights, or who have not been threatened with loss of employment for refusal to waive them, refuse to appear in a lineup in furtherance of an investigation by their superiors relative to their conduct in office, and at the same time be constitutionally protected against disciplinary actions?

Why Certiorari Should be Denied

The District Court was asked to invoke its discretionary equity powers and to enjoin the Commissioner of Police from conducting the lineup. The holdings of this Court in *Younger v. Harris*, ____ U. S. ____ 27 L. Ed. 2d 669, 91 S. Ct. ____; *Samuels v. Mackell*, ____ U. S. ____, 27 L. Ed. 2d 688, 91 S. Ct. ____; and *Perez v. Ledesma*, ____ U. S. ____, 2 L. Ed. 2d 701, 91 S. Ct. ____, decided earlier this year should be applicable to the present situation, accordingly the action of the District Court was inappropriate.

Requiring police officers to appear in a lineup set against the factual background of this case, does not raise a substantial constitutional question, warranting the granting of certiorari.

The principles of law handed down by this Court in *Gardner v. Broderick,* 392 U. S. 273, and related cases are dispositive of the main issue herein.

I

The order of the Commissioner directing the lineup did not deprive petitioners of any rights, privileges or immunities secured by the Constitution and laws as contemplated by U. S. C. A. Title 28 Section 1343(3) and U. S. C. A. Title 42, Section 1983. Thus the exercise of the District Court's discretionary equity powers was unwarranted.

The petitioners, after being advised of their constitutional rights which included the right to be represented by counsel of their own choosing, were merely directed to appear. They were not physically or forcibly made to appear nor was there any intimation that should they not appear, they would be forcibly taken into custody for that purpose.

There did, admittedly, arise the possibility that disciplinary proceedings would be commenced should they refuse to obey the command.

From these facts, assuming the refusal to stand, arose the issue whether these police officers could be disciplined upon proper departmental proceedings.

Whether or not disciplinary proceedings can be constitutionally commenced and sustained for that reason, may be a valid Federal question. But the District Court, in the sound exercise of its discretionary powers of equity, should have refused to enjoin the order, thereby leaving the officers to make their choice, whether or not to appear.

The District Court, by inappropriately exercising its equity powers and enjoining the order in fact, so totally disrupted the operation of the investigatory process as to virtually stifle the Commissioner in this legitimate pursuit.

We urge for this Court's consideration that the action of the District Court was in direct conflict with the principles enunciated by this Court in its decisions of February 23, 1971, in *Younger v. Harris*, ____ U. S. ____, 27 L. Ed. 2d 669, 91 S. Ct. ____; *Samuels v. Mackell*, ____ U. S. ____, 27 L. Ed. 2d 688, 91 S. Ct. ____; and *Perez v. Ledesma*, ____ U. S. ____, 27 L. Ed. 2d 701, 91 S. Ct. ____.

The investigation being conducted by the Commissioner concerning serious acts of misconduct, was an administrative proceeding commenced in "good faith", justified, assuredly, by more than probable cause.

Admittedly the factual situation of the above cases, differs from the one at hand, but the principles enunciated therein are, in our opinion, applicable.

All of the important elements the Court found to exist in those cases and which were set forth in great detail, as to why and when intervention in a State Proceeding by a Federal Tribunal is warranted, exist in abundance in this case.

If and when disciplinary proceedings are commenced the Federal issue as to the propriety of the lineup can be resolved by State Tribunals and the petitions will be fully and completely vindicated should the issue be resolved in their favor. Should it become necessary, review to this Court by certiorari or appeal will eventually be available. The investigation and more particularly the lineup was undertaken in good faith without even the slightest inference of harassment. The only irreparable injury alleged

is that which automatically flows from Court proceedings. This type of irreparable injury has ofttimes been rejected by this Tribunal as insufficient. No extraordinary circumstances were alleged that would render federal injunctive relief appropriate against administrative proceedings already in process.

There is nothing in the record nor is there anything as a matter of fact that even remotely suggests that this investigation was undertaken by the Commissioner other than as a good-faith attempt to enforce the States and the public's interest in a well ordered police department.

In addition to the foregoing, we now direct our argument to the merits of the present case.

II

Essential to the petitioners' argument is the proposition that there must be probable cause to effectuate a legal arrest, or that an individual must be under legal arrest or under indictment before the authorities can subject him to a lineup.

Although we concede the efficacy of this proposition as a general rule, we reject as did the Circuit Court, that it must be applied inflexibly, regardless of the uniqueness of the underlying circumstances, particularly in cases far removed from the criminal arrest area. (See opinion of 2nd Circuit Court in this case).

In a situation such as confronts us herein, the dictates of the Fourth Amendment protect individuals not from all searches and seizures, but rather, only from those that are unreasonable enough to offend the concepts of Due Process found in the Fourteenth Amendment.

This Court in *U. S. v. Rabinowitz,* 339 U. S. 56, at page 63, stated:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable searches' and regrettably in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

This principle was affirmed by this Court as recently as *Mapp v. Ohio,* 367 U. S. 643, at pg. 653.

> We are confronted herein not with a search or seizure but, rather, with what would be more closely akin to detention and inquiry, the legality of which, as indicated above, is always to be determined by its reasonableness.

The Constitution can never be considered as at war with the dictates of common sense. Therefore the recurring question of the reasonableness of a search must be determined by a delicate balancing of the interests to be served by permitting said search against the interests of the individual who claims to be aggrieved.

It therefore behooves us to examine the interests to be served on each side of the issue.

This Court in *Mapp v. Ohio,* (*supra*) at pg. 659 quoted Mr. Justice Brandeis as follows: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . . If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Throughout history, has any segment of Government been regarded by the average person as more representative of government, than the Police Department?

We have in issue the reasonableness of a lineup used herein by the Commissioner as one of the means of investigating serious acts of misconduct committed by his subordinates in order that the responsible parties might be properly identified and appropriate disciplinary action be taken.

Commenting on the public's interest in this type of situation the Circuit Court below in its opinion said:

> "Decisive to our conclusion that the lineup was indeed 'reasonable' is the substantial public interest in ensuring the appearance and actuality of police integrity. We do not believe that the public must tolerate failure by responsible officials to seek out, identify, and appropriately discipline policemen responsible for brutal or unlawful behavior in the line of duty, merely because measures appropriate to those ends would be improper if they were directed solely toward the objective of criminal prosecution. A trustworthy police force is a precondition of minimal social stability in our imperfect society, a fact repeatedly dramatized by tragic incidents of violent conflict between police and some groups of civilians that continue to break out periodically in so many of our cities."

That grave public interest warrants certain impositions upon individual rights is to be found in cases involving National Security.

In addition to the existence of a substantial public interest, we consider the gross factual situation of this case which was known to the Commissioner at the time of the command to be of prime importance to the disposition of the issue before the Court. Sworn statements by the victims verified by Police Inspector Howard Wheeler based on his first-hand observations of the results of said acts and a report made by officers charged with investigating the incident surely supplied the Commissioner with probable cause

to believe that certain acts of misconduct had been committed by some of the 62. These factors coupled with the inability of the victims to more particularly describe the culprits by name or badge number and their inability to ferret out those responsible by the use of departmental photographs establishes the prerequisite necessity of the lineup as a method of investigation.

Having established a substantial public interest in preserving the integrity and well-ordained discipline of the Police Department and the necessity of using the lineup as a means of investigation, we now direct our attention to the question whether as a method this lineup violates the Due Process clause of the Fourteenth Amendment in that the treatment is of a kind that "shocks the conscience, offends a sense of justice and fails to respect certain decencies of civilized conduct". See concurring opinion of Mr. Justice Black, *Mapp v. Ohio (supra)* pg. 664.

In this regard we consider most relevant these facts:

The lineup was scheduled, purposely by the Commissioner, for a time when virtually all of the 62 were to be working on a regularly scheduled tour of duty, subject to the commands of their superiors.

The lineup was to take place in the very familiar and friendly surroundings of Police Headquarters.

The 62 had been afforded the opportunity to be represented by counsel of their own choosing, as indeed they were, and a representative of the Police Benevolent Association. This was to assure them that the lineup would meet the standards of Due Process and the requirements set down by this Court in *U. S. v. Wade*, 388 U. S. 218.

Last, but not least, the 62 were informed of all of their constitutional rights and that they could assert such rights.

Set against this background, it is difficult for us to comprehend how such a lineup could be considered of the "rack and screw" variety.

Another factor which we consider relevant based on readings of *Mapp* and those cases preceding it, is that all that could result from said lineup were identifications, not considered by this Court to be of the same nature as real evidence, *e. g.* "fruits of the crime", "contraband" or "products used in the commission of the crime". See *U. S. v. Wade (supra)*. In other words, these officers were not being compelled to produce incriminating evidence against themselves, as contemplated by the Fifth Amendment.

Still another factor we consider supportive of the lineup is the substantial interest of the State in maintaining a well-disciplined, law-abiding Police Department. This Court recognizing this interest of the State has given its approval to State action which requires public employees, particularly police officers, to cooperate with their superiors in one effort to attain that legitimate end. See *Gardner v. Broderick*, 392 U. S. 273.

It is appropriate at this point to examine the interests on the other side of the coin in order to determine whether these interests balanced against the interests hereinbefore discussed, require this Court to find that said lineup so unreasonably infringes upon the rights, privileges and immunities of the 62 secured by the Fourth Amendment as to make it violative of the Due Process clause of the Fourteenth Amendment.

As suggested earlier, said lineup was arranged purposely by the Commissioner to take place at a time when virtually all of those involved would otherwise be on regularly scheduled duty and in the friendly and familiar confines of

Police Headquarters. It is most apparent, that any deprivation of the rights or privileges of the 62 was at most minimal and the "search and seizure" completely within the bounds of civilized decency.

There remains to be examined petitioner's contention that said lineup was ordered by the Commissioner, solely to obtain identifications for the purpose of commencing criminal proceedings against some of the 62.

Although this is not correct, in any event, the decision of this Court in *Garrity v. New Jersey,* 385 U. S. 493 and related cases, *Gardner v. Broderick (supra), Spivack v. Klein,* 385 U. S. 511, *Sanitationmen v. Sanitation Commissioner,* 392 U. S. 280 completely destroys the legal impact such contention might otherwise impart. See also *Sanitationmen v. Sanitation Commissioner,* 426 F. 2d 619 (1970).

In this regard we direct to the Court's attention the unassailable fact, that the appearance of the 62 in the lineup was in no way, shape or manner, conditioned upon a waiver or relinquishment of any or all of their Federal rights. Never were they asked to sign a waiver of immunity before their appearance.

If the 62 refused to appear in the lineup, disciplinary proceedings, if any, would have been commenced solely for their failure to cooperate in the investigation and not for refusing to sign away any of the rights secured by the Constitution. The validity of commencing disciplinary proceedings based on said refusal, under the facts and circumstances of this case, we submit, is confirmed by this Court's opinion in *Gardner (supra)* and other related cases.

The teachings of this Court tell us that a policeman can be compelled by his superiors to answer questions narrowly relating to his conduct in office upon the threat of loss of

employment unless the opinion of Mr. Justice Fortas in the *Sanitationmens* case *(supra)* is to be considered a futile exercise in rhetoric. At page 283, the Court stated:

> "Petitioners were not discharged merely for refusing to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege."

Further at page 284, the Court said:

> "As we stated in Gardner v. Broderick (supra), if New York had demanded that petitioners answer questions specifically, directly and narrowing relating to the performance of their duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake."

In closing, at page 285, it said:

> "At the same time, petitioner's, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

That the said majority opinion recognizes a distinction between police officers and civilians, is corroborated, we submit, by the language found in the concurring opinion by Harlan, J. and Stewart, J. in Gardner at page 285:

> ". . ., I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the

> faithful performance of their offices. I add only that this is a welcome breakthrough in what Spevack and Garrity might otherwise have been thought to portend."

Not having been required to waive immunity or to relinquish the ability to assert at the time of the lineup or at a future time any and all Constitutional rights, petitioners are in position effectively to protect themselves against the use of these identifications in a possible criminal prosecution.

In concluding this argument we quote for the consideration of the Court, from the dissenting opinion of Mr. Justice White, in the Spevack case *(supra)* at pg. 532:

> "The majority does not deny that the State and its citizens have a legitimate interest in ridding themselves of faithless officers. Admittedly, however, in attempting to determine the present qualifications of an employee by consultation with the employee himself, the State may ask for information which, if given, would not only result in a discharge but would be very useful evidence in a criminal proceeding. Garrity, in my view, protects against the latter possibility. Consequently, I see no reason for refusing to permit the State to pursue its other valid interest and to discharge an employee who refuses to cooperate in the State's effort to determine his qualifications for continued employment."

Conclusion

For the foregoing reasons, the Petition for a Writ for Certiorari to review the judgment and opinion of the Second Circuit, should be denied.

Respectfully submitted,

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